

86-928

Supreme Court  
FILE

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No.

IN THE  
**Supreme Court Of The United States**  
October Term, 1986

EDDIE BARNARD NEAL,

*Petitioner,*

vs.

J. D. WHITE, WARDEN, AND  
CHARLES GRADDICK, ATTORNEY GENERAL  
OF THE STATE OF ALABAMA,

*Respondent*

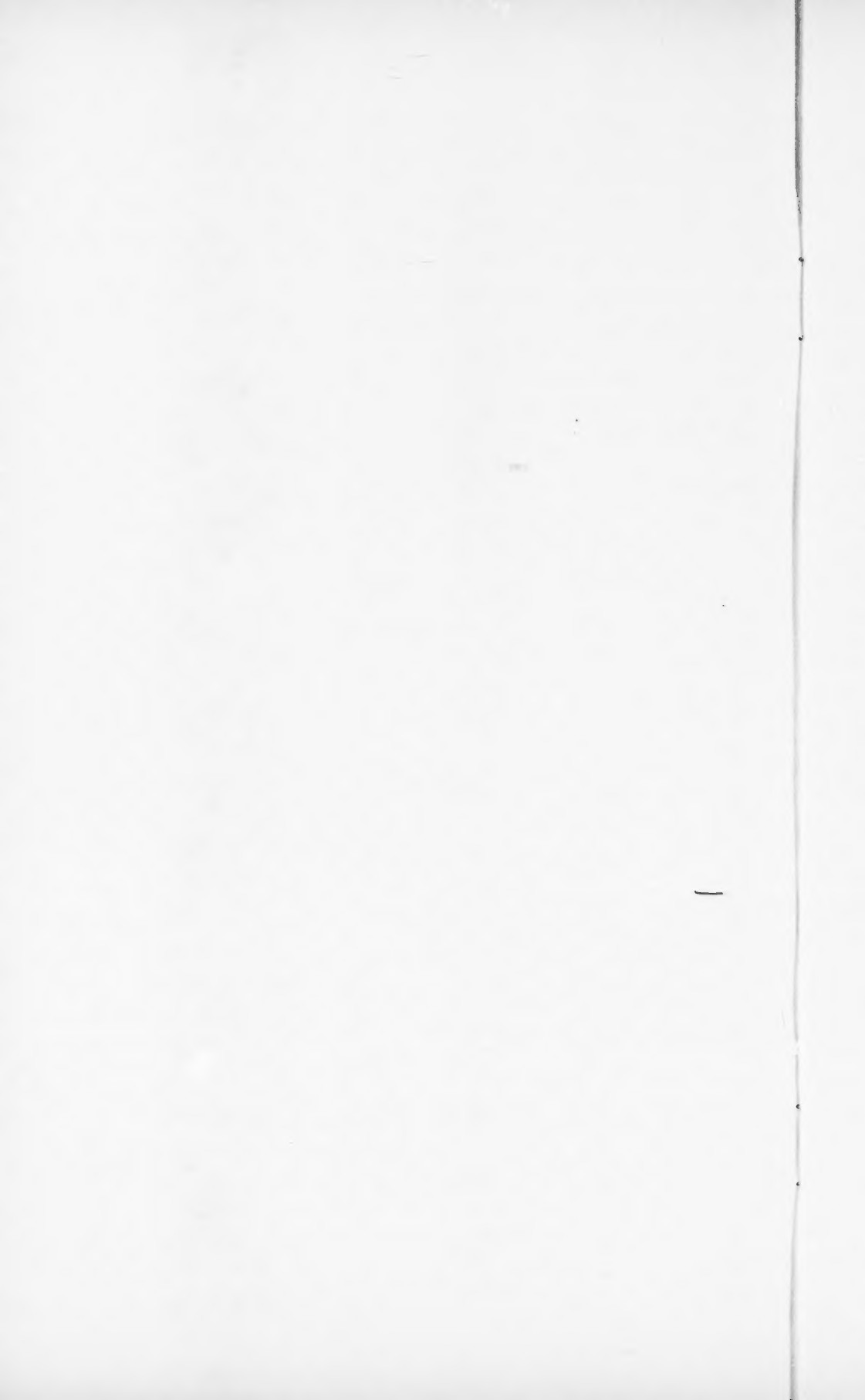
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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*Attorney for Petitioner Neal*

November, 1986

2018



## **QUESTIONS PRESENTED**

1. WHETHER THE HONORABLE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT MISAPPLIED THE REQUIREMENT THAT A DEFENDANT BE ENTITLED TO CONFRONT WITNESSES AGAINST HIM AS REQUIRED BY THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

2. WHETHER THE REQUIREMENTS OF THE SIXTH AMENDMENT OF THE UNITED STATES ARE MET IF A PROSECUTION WITNESS TESTIFIED AT AN EARLIER HEARING AND HIS TESTIMONY WAS READ IN THE CASE AT BAR IF IT WAS NOT CONCLUSIVELY SHOWN THAT THE WITNESS WOULD NOT BE AVAILABLE IN THE FUTURE.

## **CERTIFICATE OF INTERESTED PERSONS**

I hereby certify that the following are the only persons known to Petitioner Eddie Bernard Neal and undersigned counsel who are parties to or otherwise interested in these proceedings:

Eddie Bernard Neal

J. D. White, Warden

Honorable Charles Graddick, Attorney General of the  
State of Alabama

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EDDIE BARNARD NEAL,  
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**PETITION FOR WRIT OF CERTIORARI TO THE  
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**OPINION BELOW**

The opinion of the United States Court of Appeals for the Eleventh Circuit is an unpublished opinion; however, same is set forth in the Appendix *infra* pages A-1 to A-3.

**JURISDICTION**

The Petition invokes this Court's jurisdiction pursuant to Title 28, United States Code, Section 1254, in that a claim of the Petitioner's rights is presented under due process of law provisions of the Fifth Amendment, the Fourteenth Amendment, and the Sixth Amendment to the Constitution of the

United States of America. The United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part Petitioner's Appeal from a denial of Petitioner's Petition For Writ of Habeas Corpus filed in the United States District Court for the Northern District of Alabama. The Petitioner did not seek a rehearing either by a three judge panel or *en banc* in the appellate court below.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States in pertinent part states as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty or property without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States in pertinent part states as follows:

". . . nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the Constitution of the United States in pertinent part states as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him; . . ."

### **STATEMENT OF THE CASE**

Eddie Bernard Neal was indicted for capital murder in March of 1977 for the death of Quenette Shehane who was killed on December 20, 1976. Petitioner was convicted of this crime in August of 1978 and sentenced to death by a jury in the Tenth Judicial Circuit of Alabama (Jefferson County, Alabama). This verdict was commuted to life imprisonment, without parole, by the trial judge, Charles Nice.

The conviction was later reversed and remanded for a new trial in accordance with the United States Supreme Court decision of *Beck vs. Alabama*. The Petitioner was again convicted of robbery-murder on August 13, 1982, and sentenced to life without parole. This conviction was affirmed by the Alabama Court of Criminal Appeals on June 12, 1984. Rehearing was denied on July 17, 1984, and the Alabama Supreme Court denied certiorari on November 30, 1984. Petitioner filed a pro se petition for a Writ Of Error Corum Nobis to the Tenth Judicial Circuit of Alabama for Jefferson County on March 5, 1985, and said Petition was denied without opinion on March 5, 1985. Petitioner appealed this decision to the Alabama Court of Criminal Appeals and same was affirmed without opinion on June 11, 1985. Application For Rehearing was denied on July 23, 1985.

Petitioner then filed a Petition For Writ Of Habeas Corpus, pro se, on August 9, 1985. On September 30, 1985, Petitioner's Petition For Writ Of Habeas Corpus was denied by the United States District Court For The Northern District of Alabama without an evidentiary hearing, and Petitioner, pro se, filed timely notice of Appeal and certification of probable cause to the United States Court of Appeals for the Eleventh Circuit. The United States Court of Appeals for the Eleventh Circuit affirmed in part and vacated in part and remanded part of the Petition to the United States District Court For The Northern District of Alabama for further proceedings. This Appeal is taken from that portion of the decision and judgment of the United States Court of Appeals for the Eleventh Circuit which was affirmed.

## **STATEMENT OF THE FACTS**

### **Facts Relating To The Admission Of The Testimony of Leonard Mitchell Robbins (L. M. Robbins) From a Previous Trial of Petitioner's Case**

During the trial upon which Petitioner's conviction was obtained and from which appeals were taken through the Appel-

late Courts of Alabama and then to the United States District Court For The Northern District Of Alabama and ultimately to this Court, the testimony of L. M. Robbins was read to the jury from the transcript of a previous trial held during the week of July 31, 1978, which conviction was reversed by the Appellate Courts of Alabama (R - 306 - 319). The proffer and introduction of the reading of the former transcript of L. M. Robbins' testimony was predicated upon a medical condition from which the witness suffered, which was described as an evaluation for coronary artery bypass surgery (R - 282). He was being admitted to the hospital for "evaluation of a heart disease." (R - 282). A description of the witness's condition was based upon a doctor's letter, a motion, and the testimony of one David L. Higgins (R - 284 - 287). The transcript was supported by the testimony of the Court Reporter who took it down in the previous Hearing, Walter Enoch (R - 292 - 297). Timely objections were made to the introduction of all aspects of the reading of the transcript (R - 285, 286, 287, 292, 297, and 299). The Court overruled all objections and Motions For Mistrial (R - 289, 292, and 298).

### ARGUMENT

The Eleventh Circuit Court of Appeals, in its unpublished opinion, stated as follows with regard to Petitioner's assertion that his Sixth Amendment rights were violated:

"Petitioner's fourth claim arises out of the trial court's ruling that the prosecution could introduce into evidence the testimony a police officer gave at petitioner's previous trial on the charge in this case. This testimony was admitted because the officer was unavailable. We find no error, much less constitutional error, in its admission. Petitioner's trial lawyer was present when the officer testified on the earlier occasion and had ample opportunity to examine him. Moreover, the testimony bore sufficient indicia of reliability to render it probative."

The Eleventh Circuit Court of Appeals failed to follow the dictates set down by this Honorable Court in *Pointer vs. Texas*

(1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 which states that the major underlying concept of the constitutional confrontation rule is to give a Defendant charged with crime an opportunity to cross-examine the witness against him. *Pointer vs. Texas* and other cases cited herein further hold that the Sixth Amendment's right of accused to confront witnesses against him is a fundamental right essential to a fair trial and is made obligatory on the various states by the due process clause of the Fourteenth Amendment. Therefore, the confrontation clause of the Sixth Amendment is enforceable against the states under the Fourteenth Amendment according to the same standards which protect the right to confrontation against federal encroachment. See also, *Burgett vs. Texas* (1967), 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258, conformed to (*Texas Criminal*, 422 S.W.2d 728; *Harrington vs. California* (1969), 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726; *Illinois vs. Allen* (1970), 397 U.S. 337, 25 L.Ed.2d 353, 90 S.Ct. 1057, 51 Ohio Opus 2d 163, rehearing denied, 398 U.S. 915, 26 L.Ed. 2d 80, 90 S.Ct. 1684; *Dutton vs. Evans* (1970) 400 U.S. 74, 27 L.Ed.2d 213, 91 S.Ct. 210, on remand (CA 5 Georgia) 441 F.2d 657; *Davis vs. Alaska* (1974) 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105; *Dowdell vs. United States*, 221 U.S. 325, 55 L.Ed. 753, 31 S.Ct. 590; *Motes vs. United States*, 178 U.S. 458, 44 L.Ed. 1150, 20 S.Ct. 993; *Kirby vs. United States*, 174 U.S. 47, 43 L.Ed. 890, 19 S.Ct. 574.

These cases also hold, in part, that the primary purpose of the confrontation clause afforded by the Sixth Amendment to the United States Constitution is not only to secure the right of cross-examination but to additionally give the jury an opportunity to observe a witness. In *Rado vs. Connecticut* (1979), (CA 2 Conn.) 607 F.2d 572, cert. denied, 447 U.S. 920, 65 L.Ed.2d 1112, 100 S.Ct. 3009, this Court stated that the mission of the confrontation clause of the Sixth Amendment is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of prior statements.

In *Curtis vs. Reeves* (1941), 75 App.D.C. 66, 123 F.2d 936, the Court stated that the guarantee of the Sixth Amendment is to secure to the accused in the right to be tried so far as facts proveable by witnesses are concerned by only presenting such witnesses as meet him face-to-face at trial, and who give their testimony in his presence, and give to the accused the opportunity of cross-examination.

The denial of the right of cross-examination was set out in *United States vs. Stone* (1979), (CA 5 FL.) 604 F.2d 922, 4 Federal Rules Evid. Serv. 1495, which stated that the Sixth Amendment right to confront witnesses was to prevent *ex parte* affidavits. What is the difference basically so far as due process is concerned between an *ex parte* affidavit and a deposition or transcript wherein the right to cross-examine has been denied?

Also in this regard see *Hopkinson vs. State* (1981 Wy.), 632 P.2d 79, cert. denied, 455 U.S. 922, 71 L.Ed.2d 463, 102 S.Ct. 1280, and later App. (Wy.) 664 P.2d 43, cert. denied (U.S.) 78 L.Ed.2d 246, 104 S.Ct. 262 which states that the chief purpose of the confrontation clause is to bar the particular guise of trying Defendants on "evidence" which consists solely of *ex parte* affidavits and depositions secured by examining magistrates. The aim of the clause is to compel any witness against the accused to stand face-to-face with the jury in order that they may look at him and judge by his demeanor upon the stand and manner in which he gives his testimony whether he is worthy of belief. While Petitioner is aware that the Eleventh Circuit Court of Appeals has relied upon the verbiage in *Martinez vs. State* (1980) Wy. 611, P2d 831, Petitioner asserts that the Eleventh Circuit Court of Appeals has overlooked the pronouncements of *United States vs. Edwards* (1972, CA 5 Tex.) 469 F.2d 1362 which states that the use at a criminal trial of recorded testimony of a witness denies the Defendant's right of confrontation guaranteed by the Sixth Amendment subject to the limited exception where the witness is shown to be unavailable at the present trial and was subject to adequate cross-examination at a previous trial or hearing. Petitioner asserts that the witness, who was allowed to testify at his

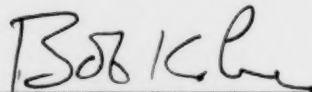
trial, was not subjected to adequate cross-examination at a previous trial or hearing.

The United States Court of Appeals for the Eleventh Circuit also has overlooked the case of *State vs. Herrera* (1979) 286 Ore. 349, 594 P.2d 823 which states that a prosecutor wishing to use prior recorded testimony which will deny the Defendant his constitutional right to confront witnesses must justify the use of the evidence and show that he was in no way responsible for the necessity of its use. Further, Petitioner would assert that the dictates of *Martinez vs. State (infra)* have not been met which would require that the evidence presented at the second trial would not "not touch upon any new and significantly material line of inquiry."

### CONCLUSION

Petitioner asserts that his basic fundamental guarantees of life and liberty afforded by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution have been violated, and he has been denied life and liberty without due process of law. For these reasons, a Writ Of Certiorari should issue to review the Judgment and Opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

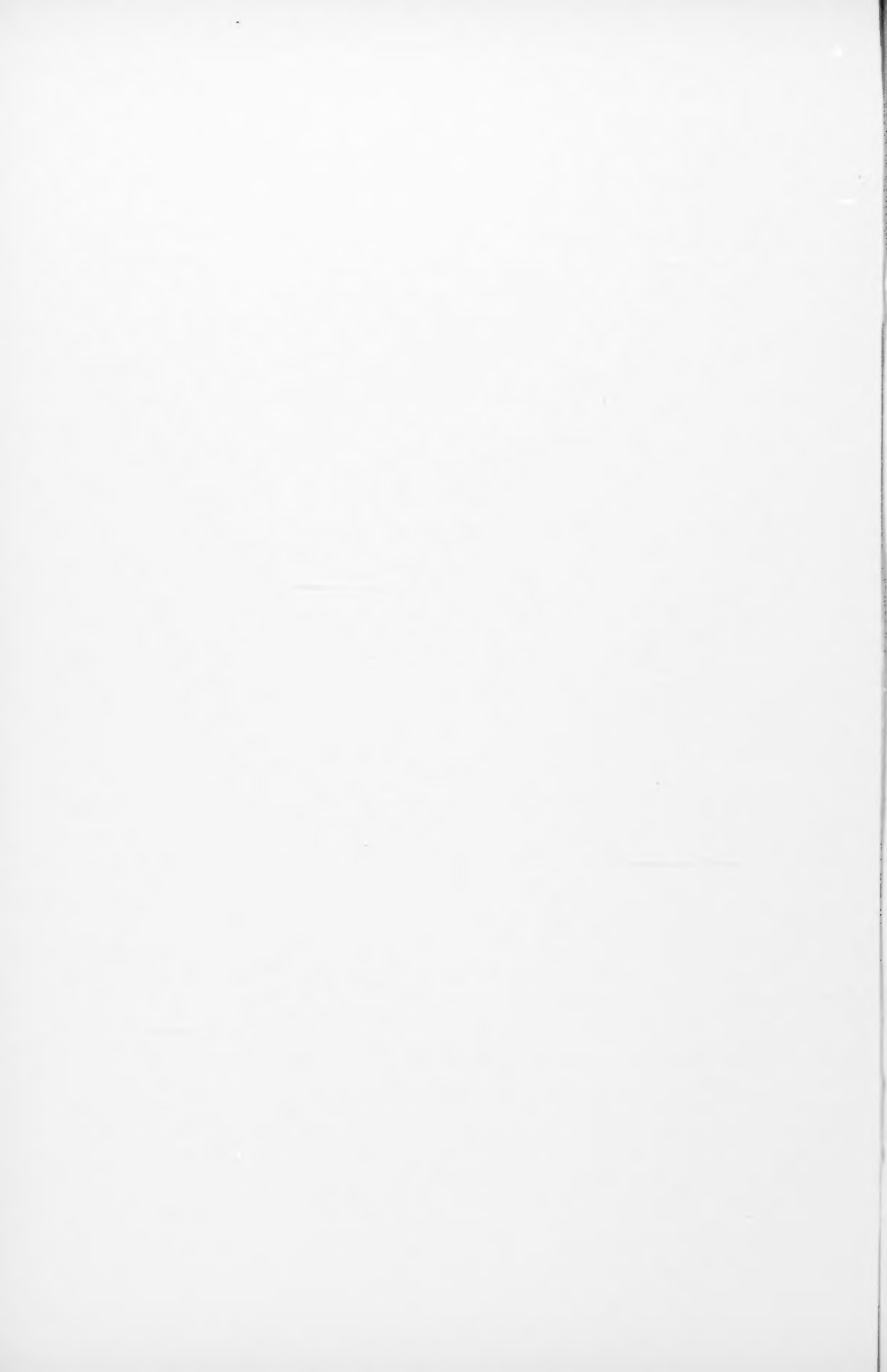



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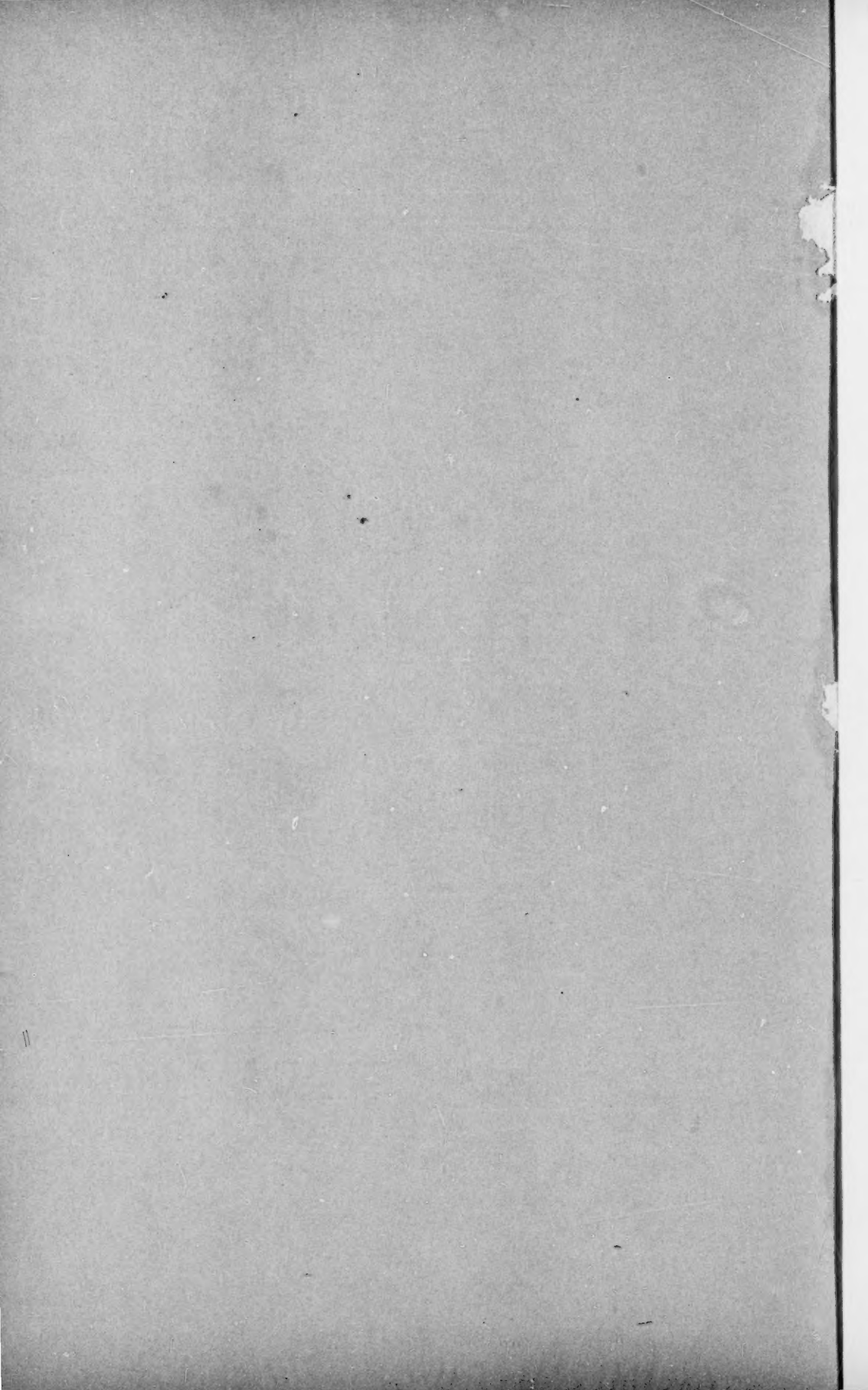
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# **APPENDIX**



A-1

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 85-7645  
Non-Argument Calendar

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EDDIE BARNARD NEAL,

Petitioner-Appellant,

versus

J. D. WHITE, Warden, and  
THE ATTORNEY GENERAL, OF  
THE STATE OF ALABAMA,

Respondents-Appellees.

---

Appeal from the United States District Court  
for the Northern District of Alabama

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(September 17, 1986)

Before TJOFLAT, HATCHETT and CLARK, Circuit  
Judges.

PER CURIAM:

The petitioner is an Alabama prison inmate serving a life sentence for committing the capital offense of robbery during which an intentional murder occurred. He seeks habeas corpus relief overturning his conviction on five grounds: (1) the prosecutor used his peremptory challenges to prevent blacks from serving on petitioner's jury; (2) petitioner was convicted under a state law not in effect when the crime was committed; (3) his counsel was ineffective because he (a) failed to raise grounds (1) and (2) above at trial and (b) he advised petitioner not to seek a change of venue; (4) petitioner was denied the right to confront a witness; and (5) the evidence was in-

sufficient to convict petitioner of the charged offense. The district court denied relief, and we granted petitioner a certificate of probable cause to appeal. We affirm the district court as to the first four claims and vacate and remand as to the fifth claim.

Petitioner committed a procedural default as to the first two claims by failing to raise them on direct appeal. He subsequently included these two claims in a *coram nobis* petition collaterally attacking his conviction, but, as the district court properly concluded, they were not cognizable on *coram nobis* and the Alabama courts rejected them for that reason.

These defaulted claims were subject to habeas consideration, however, in the context of petitioner's third claim — ineffective assistance of counsel. The first, concerning the prosecutor's use of the State's peremptory challenges, was patently insufficient under the prevailing legal standard, established by *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965); thus, counsel could not have been ineffective for failing to pursue the point on appeal. (This peremptory challenge claim may have met the standards enunciated by *Batson v. Kentucky*, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1712 (1986), but *Batson* is not retroactive. See *Allen v. Hardy*, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 2878 (1986) (per curiam)). The second, raising the *ex post facto* issue, also lacked merit. The district court therefore correctly recognized the legal insufficiency of these two defaulted claims in rejecting petitioner's ineffective assistance claim. Petitioner's third basis for contending that his lawyer was ineffective was counsel's failure to seek a change of venue. Like the district court, we find no merit in this ground. In sum, petitioner's ineffective assistance claim must fail.

Petitioner's fourth claim arises out of the trial court's ruling that the prosecution could introduce into evidence the testimony a police officer gave at petitioner's previous trial on the charge in this case. This testimony was admitted because the officer was unavailable. We find no error, much less constitutional error, in its admission. Petitioner's trial lawyer was present when the officer testified on the earlier occasion and had

ample opportunity to examine him. Moreover, the testimony bore sufficient indicia of reliability to render it probative.

As indicated above, we vacate the district court's decision on petitioner's fifth claim. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), requires a federal habeas court to decide whether no rational trier of fact could have found a petitioner guilty beyond a reasonable doubt on the evidence presented to the trier of fact. This quite obviously requires the federal habeas court to make an independent assessment of the evidence. Here, the district court relied instead on the Alabama Court of Criminal Appeals; the district court gave that court's finding that the evidence was sufficient a presumption of correctness under 28 U.S.C. § 2254 (d) (1982). The Alabama appellate court did not find facts; rather, its job was to determine whether the evidence was sufficient to support a conviction. This was a pure legal question whose decision was entitled to no deference in the proceedings below. We remand the case to the district court so that it can make this legal determination under *Jackson's* standard, by examining the record of petitioner's trial.

AFFIRMED in part; VACATED in part and REMANDED.

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 85-7645  
Non-Argument Calendar

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D.C. Docket No. 85-2161

EDDIE BARNARD NEAL,

Petitioner-Appellant,

versus

J. D. WHITE, Warden, and  
THE ATTORNEY GENERAL OF  
THE STATE OF ALABAMA,

Respondents-Appellees.

---

Appeal from the United States District Court  
for the Northern District of Alabama

---

Before TJOFLET, HATCHETT and CLARK, Circuit  
Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby. **AFFIRMED** in part and **VACATED** in part; and that this cause be and the same is hereby, **REMANDED** to said District

A-5

Court for further proceedings in accordance with the opinion  
of this Court.

Entered: September 17, 1986  
For the Court: Miguel J. Cortez, Clerk

By: /s/ WARREN A. GODFREY

Deputy Clerk

ISSUED AS MANDATE: Oct. 21, 1986.

[R-282] MR. BARBER: Mr. Robbins was in Carraway Methodist Medical Center \* \* \* Dr. Kessler, states that their current plans on August 6th, their current plans or had been readmitted to the hospital at Carraway on August 9th, to be evaluated for coronary artery bypass surgery, and if he does have the surgery he will be off of work until November of '82.

\* \* \*

[R-288] THE COURT: \* \* \* [R-289] the fact that he is under a doctor's care for anticipated triple by-pass, open heart surgery and the fact that this witness was available for cross examination and was cross examined by the same counsel present now, I'll overrule your motion and allow this testimony to be read into the record from the transcript as previously given in prior testimony.

\* \* \*

[R-291] MR. DINSMORE: Your Honor, I would like for the record to reflect that we are, of course, put in a position of moving for a mistrial because of the failure of the State to present a witness.

\* \* \*

[R-292] THE COURT: All right, your motion is denied at this time.

\* \* \*

BY MR. BARBER:

Q State your name, please.

A Walter Enoch.

Q Where are you employed, Mr. Enoch?

A I work in the Jefferson County courthouse, court reporter.

\* \* \*

[R-293] Q And were you the court reporter in a trial that began on July 31, 1978?

\* \* \*

Q And what case was that, please?

A It was State vs. Eddie Barnard Neal.

\* \* \*

Q Did you transcribe the testimony of a witness, Leonard M. Robbins?

A Yes, I did.

\* \* \*

[R-294] Q Okay, and does that transcript truly and accurately pict Officer Robbins testimony at the prior trial?

A Yes, it does.

\* \* \*

MR. BARBER: That's all.

\* \* \*

[R-297] MR. DINSMORE: We object to it, Your Honor. It's not shown that it's proof read.

\* \* \*

THE COURT: \* \* \* [R-298] All right, I am going to allow him to testify from the copy.

\* \* \*

[R-306] \* \* \* the Court is going to allow the reading of the transcript of the prior proceedings where this witness did testify.

\* \* \*

(The following questions were read by Mrs. Arnold, the answers being given by Mr. Barber, as witness Robbins testimony was read into the record, as follows:)

\* \* \*

[R-319] MRS. ARNOLD: I believe that concludes the testimony, Your Honor.

THE COURT: All right, you can come down.  
(Mr. Barber resumes seat at counsel table).

\* \* \*